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No. 96-1783

In the Supreme Court of the United States

OCTOBER TERM, 1996

OFFICE OF THE PRESIDENT,
Petitioner,
v.
OFFICE OF INDEPENDENT COUNSEL, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR PETITIONER

Based on its untethered notion that federal agencies must "favor disclosure over concealment" (Pet. App. 17a), the court of appeals held that federal governmental entities may not assert *any* attorney-client privilege – whether absolute or qualified – in federal grand jury proceedings. Nor, it added (*id.* at 25a), may they rely on work product protection for legal work performed in anticipation of legislative hearings or grand jury investigations. These rulings are important enough to require prompt review by this Court. They misapprehend well-settled principles of attorney-client privilege (see Law Professors Am. Br.) and, as the Solicitor General has explained, will have a significant adverse impact upon the activities of government lawyers (see U.S. Am. Br.).

The IC nevertheless accuses petitioner of challenging this subpoena not "because an important principle is at stake" but because "these notes reflect communications with Mrs. Clinton" (Opp. 10-11). That is an irresponsible and unfounded accusation. This case is here only because the IC chose *this setting* in which to mount a frontal attack on petitioner's attorney-client and work product privileges by serving a subpoena *duces tecum* targeted *explicitly* to attorney notes of confidential communications. Convinced by the IC, the panel majority has now concluded that no such privilege is available, at least in federal grand jury proceedings and potentially in a far wider range of situations.

White House lawyers historically have proceeded upon the premise that their work enjoys the same status as that of other organizational lawyers, aided by the traditional privileges for lawyer-client communications and work product, the assertion of which is controlled by the agency head. The IC's suggestion that the decision below is so narrow and so novel as to be unworthy of this Court's attention simply ignores reality: the Eighth Circuit's ruling shapes the decisionmaking of every official and every lawyer in the White House during every working day. Before seeking advice or responding to an inquiry from a lawyer, a White House official must now

pause to consider whether every word he speaks will, the next day or the next month, be the subject of an IC subpoena. In these circumstances, will an employee in need of ethical guidance hesitate to seek it or an employee with critical information hesitate to provide it, out of fear that what he says will be divulged at the unfettered and unreviewable discretion of the IC?[1] Will lawyers stop taking notes or preparing memoranda because their work product will simply flow directly to the grand jury? These are now very real questions in the daily business of the White House. So long as they go unanswered, the resulting uncertainty will inevitably constrain the layman's willingness to seek legal advice and the professional's ability to give it – a result that undermines rather than serves the public's interest in honest and effective government.

In sum, the petition should be granted so that governmental entities will know whether their communications with counsel enjoy the protections of traditional privilege rules, are only presumptively privileged (and thus subject to a balancing analysis by the courts, by analogy to *United States* v. *Nixon*, 418 U.S. 683 (1974)), or are freely discoverable on no greater showing than the curiosity of a federal grand jury (as the Eighth Circuit and the IC would have it).

1. Although the IC argues the merits of the case at length (Opp. 11-26), he offers no sound reason for denying certiorari. It is the sheerest self-serving speculation for the IC to assert (Opp. 8) that any delay in producing these notes will leave his investigation "frozen" in its tracks. The IC has

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[1] Indeed, if the decision of the court of appeals stands, White House lawyers, as a matter of professional responsibility, will be required to advise every employee who comes to them for advice or from whom they seek information that the confidentiality of their discussion is entirely dependent on the IC's decision whether or not to demand disclosure.

absolutely no basis for supposing that these notes, made roughly contemporaneously with his own questioning of the First Lady on the same subjects, will have the slightest value to his investigation; and, of course, grand juries get along without such materials in all other contexts. Furthermore, the attorney-client privilege will not stand in the way of the IC's gathering the facts: "The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." *Upjohn Co.* v. *United States*, 449 U.S. 383, 395 (1981). In fact, the IC has already taken extensive testimony from Mrs. Clinton, and he may seek to do so in the future; he simply may not ask the government's lawyers to hand over their privileged communications with their clients.

Nor does "[t]he novelty of the issue" (Opp. 9) warrant denial of the petition. In the first place, the "issue" is hardly novel: "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law" (*Upjohn*, 449 U.S. at 389); it has been widely applied to governmental entities, including in at least one federal grand jury proceeding.[2] The only novel aspect of this case is that, as even the IC does not dispute, the privilege has *never before* been held to apply only in some contexts but not others. While these principles have rarely had to be applied in the particular setting at issue here (see Pet. 20-21 n.6), the

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[2] See *In re Grand Jury Subpoena*, 886 F.2d 135 (6th Cir. 1989). Contrary to the IC's suggestion (Opp. 8 n.7), the Sixth Circuit's decision did not turn at all on the fact that "a state agency" was involved. Moreover, the fact that the Sixth Circuit found it unnecessary to undertake substantial analysis to decide that a governmental attorney-client privilege generally applies in a federal grand jury investigation reflects just how deeply that assumption is embedded in the fabric of our law. No doubt that is why the Eighth Circuit felt constrained to note (Pet. App. 9a) its explicit disagreement with the Sixth Circuit's "unpersuasive" decision.

building blocks of the analysis are, to quote the IC (Opp. 16), "historically rooted" and "recognized in the vast majority of the States."

In any event, novelty, under these circumstances, is no reason to deny the petition, for the reasons recently explained in *Clinton* v. *Jones*, No. 95-1853, slip op. 6-7 (May 27, 1997). Indeed, the need for review is far greater here, because substantial reliance interests are at stake: government lawyers, and their institutional clients, rely on certain assumptions regarding the protections afforded their legal advice-giving functions. If those assumptions are to be materially altered to conform to the Eighth Circuit's ruling, prompt and definitive explanation of the nature of the new rules is essential.[3]

Finally, there is nothing "narrow," much less "exceedingly narrow" (Opp. 9), about the majority's decision. Even if the court of appeals' decision could be confined, as the IC surmises (*ibid.*), to "federal criminal proceedings," the issue would hardly be a narrow one. The proliferation of Independent Counsel investigations ensures that this will be a recurring concern not only for this but for future Administrations. Moreover, as noted in the petition (at 16-17), the majority's reasons for rejecting the governmental attorney-client privilege are not easily limited to the grand jury

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[3] The actions of lawyers in previous Administrations evidence the widely-held belief that the attorney-client privilege may be asserted by executive branch agencies in this context. Then-White House Counsel Boyden Gray, for example, on several occasions asserted the President's attorney-client privilege in the Iran-Contra investigation. See Walsh, FIREWALL 271 (1997); FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS 479 n.65 (Aug. 4, 1993).

setting.[4] And the majority's restrictions on the scope of the work product protection – including in particular its conclusion that contentious legislative hearings do not constitute "litigation" for purposes of the doctrine – would have dramatic practical consequences, not only for any Executive facing a Congress controlled by the opposite party but even with respect to legal work done by private lawyers to assist private clients embroiled in legislative proceedings.[5]

More fundamentally, however, the IC's effort to confine the impact of the panel's decision to "federal criminal proceedings" ignores the fact that government lawyers and their clients – especially those dealing with matters related in any way to pending or possible future IC investigations – can have no advance assurance that a grand jury will not one day

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[4] For example, although the IC asserts (Opp. 9) that "[t]he court of appeals' decision is entirely consistent with recognition of governmental attorney-client and work product privilege in federal civil proceedings," he adopts the majority's analogy of government lawyers as "auditors" and yet fails to explain how that analogy can sensibly be limited to the grand jury arena. And the mere fact that there is a set of rules and principles that govern *certain* aspects of federal criminal discovery (see Opp. 9 n.8) would not foreclose criminal defendants from seeking attorney-client communications under the general subpoena power vested in *all* criminal litigants, including defendants, by Fed. R. Crim. P. 17 (a rule omitted from the IC's list in footnote 8).

[5] The IC barely addresses work product, stating (Opp. 28) only that there is "no case law support" for the proposition that congressional proceedings may constitute litigation for purposes of the doctrine. He is mistaken. See, *e.g.*, *In re Air Crash Disaster at Sioux City, Iowa*, 133 F.R.D. 515, 526 (N.D. Ill. 1990) (drafts of letter to a member of Congress concerning questions posed at a hearing constitute protected work product); *United States* v. *Davis*, 131 F.R.D. 391, 406-406 (S.D.N.Y. 1990) (documents created at time of congressional investigation constitute work product).

take an interest in their communications. As the Law Professors explain (Am. Br. 10 n.6), "because [t]he focus is on encouraging communication *ex ante*, the essence of the privilege goes to the need for candor and full access to information at the time the communication is made, not to the need for the information after the communication is made." The majority's flat rejection of a governmental attorney-client privilege in this setting thus will affect a wide array of attorney-client communications, including the overwhelming majority that are useful but completely innocuous, simply because they may one day become the subject of IC curiosity. These problems are especially acute when government officials are individually represented by private counsel, who will be extremely cautious in permitting their clients to speak to government lawyers about their official conduct.

2. a. On the merits, the IC's main contention is that 28 U.S.C. § 535(b) requires petitioner to disclose the subpoenaed notes to the federal grand jury. The court of appeals, it should be noted, referred to Section 535(b) only in passing (Pet. App. 17a); yet it is now so much the centerpiece of the IC's presentation that he has drastically rewritten (and distorted) our Questions Presented.

In any event, there is not the least indication that Congress intended Section 535(b) to play the role the IC would assign to it or to overcome traditional privileges.[6] The IC's selective citation (Opp. 13, 15) to the legislative history of Section 535(b) is misleading. The statute was intended

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[6] It is doubtful that Section 535(b) even applies to petitioner, because the Executive Office of the President and its components are neither "departments" nor "agencies" as defined in 5 U.S.C. §§ 101 and 105. See *Haddon* v. *Walters*, 43 F.3d 1488 (D.C. Cir. 1995). The IC is wrong in asserting (Opp. 14 n.16) that the White House has conceded the applicability of Section 535(b). It is the IC who has never before claimed that petitioner is violating Section 535(b).

principally to eliminate a "jurisdictional conflict of authority" that had inhibited the ability of the FBI and the Department of Justice to investigate crimes allegedly committed by Treasury employees. See H.R. Rep. 2622, 83d Congress., 2d Sess., *reprinted in* 1954 USSCAN 3551. Under previous administrations, only the Department of the Treasury could conduct the initial investigation of its own personnel, and Treasury had "refused to permit" the FBI access to witnesses and documents. Section 535(b) was meant simply to make clear that the Attorney General "ha[d] the *authority* to investigate any violation of the criminal statutes involving Government officers and employees" (*id.* at 3552, emphasis added) – and nothing more. Even the snippet that the IC quotes (at 13) from the testimony of Deputy Attorney General Rogers confirms that it was access "to all units" of government – not to all information, privileged or not – that the legislation sought to achieve.

That said, the Office of the President, as a matter of policy and in recognition of the constitutional duty to execute the laws, embraces the principles embodied in Section 535(b), and on various occasions has referred information to the Attorney General reflecting the possible commission of a criminal offense – including information otherwise protected by attorney-client privilege. The IC does not have the slightest basis to believe that petitioner has abandoned that policy here, or that some "alleged irregularities" have come to petitioner's "attention" by virtue of these confidential communications (Opp. 13) but have not been reported.

It is one thing, however, to agree (as we all do) that the Office of the President has a duty, recognized in official policy and practice, to turn over evidence of a crime; it is quite another to insist (as the IC does) that Section 535(b) – a statute that was enacted merely to settle a narrow jurisdictional dispute between agencies and that has always been interpreted by the Office of Legal Counsel to have no bearing on privilege – empowers the IC unilaterally to strip from

Executive Branch entities their right to a privileged relationship with their attorneys.[7]

b. The IC's remaining defenses of the result (if not the logic) of the majority's ruling are largely makeweight. Although the public assuredly "'has a right to every man's evidence,'" (Opp. 16), this Court pointedly noted in *Nixon* that there is an exception to that principle for "common-law * * * privileges," including for "an attorney or a priest[, who] may not be required to disclose what has been revealed in professional confidence." 418 U.S. at 709. Similarly, the IC's concern (Opp. 20) that wrongdoing might remain hidden if a privilege were honored ignores the truism that the privilege protects only communications with counsel, not the underlying facts themselves. And the IC's optimistic prediction (Opp. 21) that agencies' efforts to gather facts will be unaffected by the demise of the privilege ignores the central premise of the privilege – that clients must have a satisfactory degree of confidence regarding the confidentiality of their communications with counsel or else attorneys will not receive full cooperation and clients' interests will be poorly served.

Finally, it is the panel majority, not petitioner, whose position "contravenes this Court's decision in *Nixon*" (Opp. 18). By its terms, *Nixon* requires a "demonstrated *specific* need" for evidence sufficient to persuade the trial court that the subpoenaed material is "'*essential* to the justice of the [pending criminal] case'" before presumptively privileged government materials may be released in response to a subpoena. Under the majority's ruling, however, the IC

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[7] If Section 535(b) were as "clear and all-encompassing" (Opp. 12) as the IC asserts, it is hard to understand why the statute received no attention from this Court in connection with President Nixon's claims of executive privilege. See *BankAmerica Corp.* v. *United States*, 462 U.S. 122, 131 (1983).

would not have to make *any* showing of need before insisting on production of privileged materials. By the majority's lights, the attorney-client privilege is not even a qualified privilege (analogous to executive privilege in *Nixon*). It simply has no force at all – just as if government attorney-client communications had the status of a chat with a bartender or a barber.[8]

3. The critical issue for this Court – which the IC tries to obscure – is not whether communications between a government attorney and client enjoy an absolute or a qualified privilege, but whether, as the Eighth Circuit held, they are subject to *no privilege at all.* In the Eighth Circuit's view, it is the Independent Counsel, rather than the President of the United States or the courts, who alone has the power to weigh the competing governmental interests in effective lawyering and criminal law enforcement. We submit that the IC, an "inferior officer" (see *Morrison* v. *Olson,* 487 U.S. 654 (1988)) with a sharply limited area of responsibility and an obvious institutional bias, is functionally incapable of striking a true balance between those interests. Cf. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 449-453 (1971).

In an era of increasingly complex legal duties, of ever-intensifying legislative and prosecutorial oversight, and of burgeoning litigation with private parties, the Executive Branch should not be denied a prompt and definitive resolution of the scope of its right to have confidential consultations with its attorneys, free from the concern that those consultations may someday be compromised on no greater showing

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[8] The IC's suggestion (Opp. 24) that we did not "see fit to advance" this reading of *Nixon* in the courts below is mistaken. See White House C.A. Br. 35 n.15.

of need than the IC has made in this case – to wit, none at all. The petition for a writ of certiorari should be granted.[9]

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[9] Contrary to the IC's suggestion (Opp. 26), Mrs. Clinton assuredly *is* "a representative of the client under *Upjohn*" (Br. 26), as the district court correctly found (Pet. App. 71a-72a). In any event, that is an issue that the court of appeals would be free to consider on remand if this Court sets aside its broader ruling that, regardless of Mrs. Clinton's status, there simply is no governmental attorney-client privilege in the grand jury context. The IC is likewise wrong in contending (Opp. 27-28) that petitioner may have waived the privilege that would otherwise protect its communications with the First Lady by interviewing her in meetings that included her private counsel (with whom she also and simultaneously could make the same privileged communication). The common interest protection is easily broad enough to preclude a waiver under these circumstances. See American Bar Association, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 48-50 (1989). And the availability of the privilege in this situation is very much encompassed within the Questions Presented. See Pet. i. Finally, it would be entirely appropriate for this Court to reverse the decision below either on the district court's rationale (see Pet. App. 80a) that enforcement of the subpoena would be inconsistent with the parties' reasonable expectations about the privileged nature of the communications or because the decision should have been given prospective effect only. See Pet. i.

Respectfully submitted.

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